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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-741

JESSE KETCHUM, M.D., *Petitioner,*

v.

STATE OF NEW YORK, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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JESSE KETCHUM, M.D., *Petitioner,*

v.

STATE OF NEW YORK, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, Jesse Ketchum, M.D., respectfully requests this Court to issue a writ of certiorari to the New York Court of Appeals to review its judgment in the above-captioned case.

CITATION TO OPINIONS BELOW

The memorandum opinion of the New York Court of Appeals, issued October 23, 1974, and not yet reported, is set out in the Appendix, *infra,* at 1a.

The memorandum of the Supreme Court of New York, Appellate Division, Fourth Department, dated

June 27, 1974, is reported as *People* v. *Ketchum*, — App. Div. 2d —, 358 N.Y.S.2d 353 (4th Dep't 1974), and set out in the Appendix, *infra*, at 2a.

The unreported judgment of the Supreme Court of New York, Erie County, dated October 26, 1973, entered on a verdict of guilty, is set out in the Appendix, *infra*, at 2a.

JURISDICTION

The Memorandum opinion of the New York Court of Appeals was issued and filed October 23, 1974, and constitutes the judgment of that Court (App. 1a). No request for rehearing was made.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2) & (3). Cases supporting jurisdiction include: *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Webb* v. *Texas*, 409 U.S. 95 (1972) (per curiam); *Rabe* v. *Washington*, 405 U.S. 313 (1972) (per curiam).

QUESTIONS PRESENTED FOR REVIEW

I. Whether Dr. Ketchum was denied due process, in violation of the Fourteenth Amendment, where the criminally negligent homicide statute, N.Y. PENAL CODE §§ 15.05, 125.10, never before applied in a medical context, and the indictment, provided neither notice of the conduct charged nor specific pre-existing professional standards, and there was no evidence on two essential elements of the offense?

II. Whether Dr. Ketchum was denied a fair trial in violation of the Fourteenth Amendment where his prosecution for criminal negligence in performing a legal abortion resulting in death was permeated with

improprieties and error which even the Court of Appeals recognized as including "grievous misconduct" that was to be "strongly condemn[ed]"?

STATUTES INVOLVED

N. Y. PENAL CODE § 125.10, at 224 (McKinney 1967), provides:

> "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

N. Y. PENAL CODE § 15.05, at 21 (McKinney Supp. 1973-74), provides in pertinent part:

> "4. 'Criminal negligence.' A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

INDICTMENT

The provision of the indictment on which Dr. Ketchum was convicted states:

> ". . . THE GRAND JURY OF THE COUNTY OF ERIE, by this indictment, accuse JESSE KETCHUM of the following crime:
>
> "Criminally Negligent Homicide, in that he, the said JESSE KETCHUM, on or about the 16th day of June, 1971, in the County, with criminal negligence, caused the death of Margaret Louise Smith by his choice of a surgical procedure, to wit: a vaginal hysterotomy, under all the circumstances

of this case and by failing to care for and provide for her proper medical care, after that procedure was utilized."

STATEMENT OF THE CASE

I. FACTS

From 1828 until July 1, 1970, the practice of induced abortion by a physician was illegal by statute in New York State, except where necessary to save the life of the pregnant woman.[1] This was the case in the overwhelming majority of American States during that time.[2] Authorities relied upon by this Court in *Roe* v. *Wade*, 410 U.S. 113, 149 n. 44 (1973), estimated that open legal abortion experience within hospitals and clinics in the 1960's was limited to perhaps 8,000 abortions per year,[3] as contrasted with about 4 million births.[4]

In other words, abortion experience was severely restricted until July 1, 1970, when the New York legislature passed a new law permitting elective abortion to be a matter between physician and patient.

The 1970 law, N.Y. PENAL CODE § 125.05, at 168 (McKinney Supp. 1974-1975), changed this and provided:

> " '. 'Justifiable abortional act.' An abortional act is justifiable when committed upon a female

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[1] *See* N.Y. Rev. Stat., pt. IV, c. I, tit. II, art. 1, § 9, at 661, and *id.*, tit. VI, § 21, at 694 (1829), cited in *Roe* v. *Wade*, 410 U.S. 113, 138 n. 31 (1973).

[2] *Roe* v. *Wade*, 410 U.S. at 139 & nn. 33-36.

[3] Tietze, United States: Therapeutic Abortions, 1963-1968, 59 Studies in Family Planning 5 (1970).

[4] *Id.*

> with her consent by a duly licensed physician . . . within twenty-four weeks from the commencement of her pregnancy."

The law permitted a physician to perform an abortion upon a patient prior to the 24th week. There was no requirement that the physician do the procedure in any particular kind of facility, such as a hospital or surgicenter.

The official Commentary to the statute pointed out that many States required hospitalization or residency, but that N.Y. PENAL CODE § 125.05 "contains neither hospital nor residence requirements." *Id.* at 169.

Similarly, New York courts periodically referred to this unambiguous fact:

> "Abortions were legalized in New York State in 1970 (Penal Code, § 125.05 [L.1970, ch. 127]) and outside New York City they may be performed in doctor's offices (*Robin v. Incorporated Vil. of Hempstead*, 30 N.Y.2d 347, 334 N.Y.S.2d 129, 285 N.E.2d 285." *People v. Dobbs Ferry Medical Pavillion*, 40 App. Div. 2d 324, —, 340 N.Y.S.2d 108, 110 (2d Dep't), *aff'd*, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973).

During the first two years of legal abortion in New York, approximately 402,000 abortion patients were helped in New York City alone.[5]

Against this background Dr. Jesse Ketchum, with twenty-five years experience (R IV:2460) [6] as a board-

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[5] Pakter, Two Years Experience in New York City With the Liberalized Abortion Law—Progress and Problems, 63 Am. J. Pub. Health 524 (1973).

[6] All references are to the Record on Appeal in the New York Court of Appeals, *i.e.*, R I:100 = Volume I, page 100.

certified specialist in obstetrics and gynecology, began practicing in Buffalo, New York, in the professional medical building at 50 High Street across the street from Buffalo General Hospital (R II:689, 969).

In Buffalo Dr. Ketchum specialized in abortion practice. He received referrals from clergy, priests, ministers, and local physicians (R I:578).

The climate in Buffalo, however, was apparently not favorable to open, legal abortion practice outside of the hospital. Although abortion had been legal for a week, Dr. Ketchum was raided at his office on July 6, 1970, by the same police officers who investigated this case a year later. (R II:906, 908).

After the July 6, 1970, raid, Dr. Ketchum continued his medical practice. Then, on June 16, 1971, a patient Margaret Louise Smith expired after an abortion, and Dr. Ketchum was subsequently indicted for criminally negligent homicide, N.Y. PENAL CODE §§ 15.05, 125.10.

This case is the only known instance in which a physician has been prosecuted in connection with a death from a legal abortion. There were 29 deaths from 446,052 legal abortions in New York State from July 1, 1970, to June 30, 1972,[7] but no other physician was prosecuted.

Also, this is the only prosecution of a physician under the criminally negligent homicide statute since it was passed. The cases have typically been brought for drunken driving. See Annotations to N.Y. PENAL CODE §§ 15.05, 125.10.

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[7] Berger, Maternal Mortality Associated with Legal Abortion in New York State—July 1, 1970-June 30, 1972—43 Am. J. of Obst. & Gyn. 315 (1974).

Margaret Louise Smith came with her common law husband, Billy Ray Ellenburg, from Ypsilanti, Michigan, to Buffalo, New York, on the morning of June 16, 1971. Her abortion procedure was performed by Dr. Ketchum some time after 10 o'clock a.m. (R I:416).

One of Dr. Ketchum's assistants, Judith Hassett Nicosia, testified that "nothing was abnormal" (R I:512) when she checked on the patient around noon. On a subsequent routine check, however, she spoke to the patient and saw that there was "bleeding enough to worry me and to summon the doctor." (R I:516).

Dr. Ketchum "went immediately into the room with Margaret Smith. (*Id.*). He responded "instantaneously" when summoned. (R I:564).

Nonetheless, the patient's condition became such that Dr. Ketchum asked that the rescue squad be summoned to take her to the Buffalo General Hospital across the street. (R I:527). This was done, but the patient unfortunately expired and was pronounced dead on arrival.

By 5:45 p.m. Lt. Leo J. Donovan, Chief of Homicide, who had raided Dr. Ketchum the year before, was at the doctor's office with four other officers. (R III:901, 909). No *Miranda* warnings were given. (*Id.* at 902). The officers "secured" the offices (*Id.* at 850), took various charts and other items (*Id.* at 597-598), photographed the treatment room (*Id.* at 966), and questioned Dr. Ketchum. (*Id.* at 658, 670, 673, 675, 910, 954, 964).

That evening an autopsy was performed, with Lt. Donovan present. (R I:261).

A grand jury investigation and indictment followed.

At the trial Dr. Ketchum defended, through counsel and expert testimony, on several grounds.

First, the statute and indictment provided no fair notice of the conduct charged. As defined, criminally negligent homicide entails failure to perceive "a substantial and unjustifiable risk," N.Y. PENAL CODE § 15.05(4), that death will occur, and a "gross deviation" from a reasonable standard of care.

The indictment provided little further illumination. It charged Dr. Ketchum with performing a "vaginal hysterotomy" which was not the procedure shown by the autopsy at all, as appears more fully hereinafter.

The indictment also used the term: "under all the circumstances of this case." What circumstances? This provided the defense with utterly no warning whether fault was to be charged in regard to anesthesia, oxygen use, laboratory tests, intravenous liquids, or any other aspect of the clinic, Dr. Ketchum's practice, or his staff. A bill of particulars had been of no aid also.

Details of the prosecution's prima facie case did not begin to emerge clearly until the trial, and these continued to vary throughout the proceedings. They showed a very sharp dispute as to what happened the day the patient expired.

Apparently, the prosecution theorized that the patient had been more than 12 weeks pregnant (R I:58), that a vaginal hysterotomy procedure (*Id.* at 55) had been performed, that such a procedure was not standard in the local medical community (*Id.* at 61), that there were not but should have been blood or blood derivatives in Dr. Ketchum's clinic (*Id.* at 60), that during the operation there was a tear in the cervix

which was only partially sutured and from which the patient did bleed (*Id.* at 60), that Dr. Ketchum did not adequately locate the source of bleeding, that the patient expired as a consequence, and that the sum total came to criminally negligent homicide.

The defense was straightforward.

Counsel repeatedly attempted to ascertain the detailed basis of the criminal charges, all to no avail, as appears in the next section.

Expert testimony and medical texts were introduced to show that the medical procedure was not a "vaginal hysterotomy," but a simple D&C. (R III:1478, II:1059, II:755-756). As appears, the prosecution charged the wrong operative procedure.

Defense counsel repeatedly showed that there were no preexisting definite legal standards regarding the performance of abortions in New York in 1971. Indeed, the New York Court of Appeals held the only set of regulations unconstitutionally vague in *People v. Dobbs Ferry Medical Pavillion*, 33 N.Y. 2d 584, 347 N.Y.S. 2d 452, 301 N.E. 2d 435 (1973), before the trial of this case.

Estimations of the patient's pregnancy ranged from 12 to 20 weeks, according to the witness, and testimony showed the uncertainties in making such estimates. (R III:1488, 1502, II:1041).

By expert testimony and cross-examination of prosecution witnesses, defense counsel sought to establish that this had been a case of uncontrollable bleeding caused by amniotic fluid embolism. The medical details of this defense go beyond the scope of this Petition, but, briefly, such a cause of death is uncommon,

although not rare, and is beyond the physician's control. (R III:1693-1700, III:1500).

In lay terms, amniotic fluid is the waterlike substance in the sac which holds the fetus. If this fluid gets into the woman's bloodstream, it goes to the lungs and usually causes the blood to cease clotting. Death by uncontrollable bleeding over minutes or hours is the result (R III:1693-1696).

Two experts with background experience concerning amniotic fluid embolism testified that this was a cause of death here. (R III:1700, 1500). This was the logical explanation put forth by the defense, but which did not prevail.

Dr. Ketchum is at liberty on $10,000.00 bail pending disposition of this Petition. The sentence imposed was three years at Attica State Prison.

II. WHEN AND HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Defense counsel raised a Fourteenth Amendment claim of lack of notice in the statute and indictment throughout the proceedings below. Objections to individual and cumulative deprivations of a fair trial were also raised repeatedly and ruled upon adversely.

The affidavit of counsel supporting the first Motion to Dismiss Indictment (R IV:2489-2540) stated:

> "26) This indictment does nothing to inform us of what particular actions or instances of inaction on the part of the accused are being deemed criminal by the State." (*Id.* at 2498).

The trial judge denied this aspect of the motion with one conclusory paragraph. (*Id.* at 2773).

A second Motion to Dismiss Indictment (R IV:2780-2795), more specifically argued:

> "(a) The indictment and corresponding Bill of Particulars violate the defendant's rights to due process of law;
>
> "(b) The indictment is defective in that the statutes defining the crime charged are unconstitutional or otherwise invalid . . ." (*Id.* at 2780)

The supporting affidavit carefully analyzed the unconstitutional indefiniteness of the statute, indictment, and bill of particulars, repeatedly suggesting that Fourteenth Amendment standards were not being met. (*Id.* at 2781-2795, ¶¶ 7(a)-(f), 15-18, 23, 26, 27, 30, 31, 34, 35, 36, 37, 38, 39, 40, 52, 53, 54, 55, 56, 58, 59, 60).

Again the trial judge denied the motion stating simply: "[D]ue deliberation having been had thereon, the motion of the defendant is denied in all respects." (R IV:2798).

Immediately before the trial, defense counsel renewed the above motions, and they were denied. (R I:38). A defense request for a definition of a prima facie case was denied. (R I:51).

During the trial, defense counsel objected to the misconduct and rulings which are the subject of this appeal. Record citations appear, *infra*, where each point is outlined. Appendix B, *infra*, contains sections of the testimony of particular importance to the Federal constitutional and fair trial issues presented by this Petition.

At the close of the evidence, defense counsel renewed all motions, including those for a mistrial. (R IV: 2138). These were again denied. (*Id.* at 2148).

Objections to the prosecutor's inflammatory summation and further motions for mistrial were made at the end of summation. (R IV:2353). These were denied. (*Id.* at 2354).

Requests to charge and objections to the charge were all denied. (R IV:2413).

On the intermediate appeal to the Supreme Court, Appellate Division, Dr. Ketchum challenged the criminally negligent homicide statute as unconstitutionally applied to him. *Brief for Defendant-Appellant,* pp. 4-18, *People* v. *Ketchum,* — App. Div. 2d —, 358 N.Y.S. 2d 353 (4th Dep't 1974). Reliance was placed on numerous Fourteenth Amendment due process cases from this Court. *E. g., Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966); *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939).

Similarly, Dr. Ketchum argued to the Appellate Division that his constitutional right to a fair trial had been violated, citing numerous examples, including the cross-examination of his chief expert witness, Dr. Milan Vuitch, and the prosecutorial misconduct occurring on summation. *Brief for Defendant-Appellant,* pp. 18-36, *People* v. *Ketchum, supra.* Again, reliance was placed on important fair trial—due process decisions from this Court. *E. g., Napue* v. *Illinois,* 360 U.S. 264 (1959); *Krulewitch* v. *United States,* 336 U.S. 440 (1949).

Nonetheless, the Appellate Division affirmed without opinion. (App. A at 2a).

Leave was granted to appeal to the New York Court of Appeals, where Dr. Ketchum reiterated and strengthened his Federal constitutional arguments.

Further cases on lack of notice in the application of indefinite statutes were cited. *E. g., Smith* v. *Goguen,* 415 U.S. 566 (1974); *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972).

Similarly, Dr. Ketchum brought in the Fourteenth Amendment fair trial decisions cited above. The prosecution, it should be noted, relied heavily on *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974), which was a straightforward Fourteenth Amendment due process—fair trial case.

The opinion of the New York Court of Appeals, while not extended, (App. A at 1a), must have determined both sets of Fourteenth Amendment due process issues.

This was a case where decision of each Federal question "was necessary to the determination of the cause, and . . . the judgment as rendered could not have been given without it." *Brown* v. *Atwell,* 92 U.S. 327, 329 (1876).

The New York Court of Appeals expressly held that "the misconduct does not reflect a pattern throughout the trial . . ." *People* v. *Ketchum,* 35 N.Y. 2d —, 360 N.Y.S. 2d —, — N.E. 2d — (Oct. 23, 1974) (No. 419). This holding *must* entail a conclusion that the trial as a whole was not so unfair as to abridge the Fourteenth Amendment due process right to a fair trial. The point was briefed and argued.

Similarly, the New York Court of Appeals was squarely faced with a constitutional challenge to the application of the criminally negligent homicide statute, N. Y. Penal Code §§ 15.05, 125.10. The State argued that *People* v. *Haney,* 30 N.Y. 2d 328, 333 N.Y.S. 2d 403, 284 N.E. 2d 564 (1972), foreclosed this

issue. *Brief for Respondent,* pp. 22-24, *People* v. *Ketchum, supra.* The New York Court of Appeals apparently agreed, finding sufficient proof of guilt, which would not be pertinent if the statute as applied were regarded as constitutionally suspect.

If the constitutional basis of the New York Court of Appeals decision should appear unclear, it would be proper for this Court to grant the petition for certiorari, vacate the judgment, continue bail, and remand for a more specific constitutional determination, as was done in *Dep't of Motor Vehicles* v. *Rios,* 410 U.S. 425 (1973) (per curiam). Such a course may be more particularly warranted where, as here, there is no possibility of an independent and adequate state ground.

REASONS FOR GRANTING THE WRIT

The Court should review this case for three principal reasons.

Lack of Notice of Pre-Existing Legal Standards

First, the New York Courts upheld the conviction for criminally negligent homicide, although that statute had never before been applied in a medical context, the indictment and statute provided grossly insufficient notice of the conduct charged, there were no clearly defined pre-existing standards of medical practice in the abortion area, and there was no evidence on two essential elements of the offense.

The lack of fair notice and vagueness in the New York criminally negligent homicide statute affect important privacy and due process rights and raise substantial Federal constitutional questions at least as serious as those involved in numerous previous decisions by this Court. *E. g., Smith* v. *Goguen,* 415 U.S. 566 (1974); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966);

Giaccio v. *Pennsylvania* 382 U.S. 399 (1966); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921); *see generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

The criminal negligence statute, historically applied only in automobile accident cases, speaks of "fail[ure] to perceive a substantial and unjustifiable risk" and of "gross deviation from the standard of care that a reasonable person would observe in the situation." N. Y. PENAL CODE § 15.05. There is no reference to medical standards and how these standards are to be determined. That is the crux of this case. Unable to rely on pre-existing published legislative standards, the prosecution attempted to develop proof *during the trial* of supposed medical standards in an area where there had been very little medical experience to be incorporated *ex post facto* into the criminal code by the jury as it deliberated.

As more fully appears hereinafter, the case resulted in a flagrant Fourteenth Amendment due process violation because, as a matter of law, the statute, indictment, and testimony showed an elementary lack of fair notice and absence of pre-existing legal standards. Further, there was utterly no competent evidence on two essential elements of the offense as ultimately defined during the trial by the prosecution.

Impact on Roe v. Wade and Doe v. Bolton

Second, the conviction in this case must be overturned in order to prevent the emergence of unreasonably restrictive local standards in communities hostile to abortion and concomitant prosecutorial circumven-

tion of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Abortion, like any other medical procedure, carries with it some risk of complications, and even death. The risk, however, is and has been found by this Court to be minimal. As *Roe* noted, "[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." 410 U.S. at 149, n. 44.

Roe also pointed out that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forego it, has largely disappeared." 410 U.S. at 149.

The *Roe* and *Doe* opinions stressed that the State could not impose a hospital or licensed facility requirement on the performance at least of first trimester abortions. *Roe*, 410 U.S. at 163; *Doe*, 410 U.S. at 194-195; *accord*, *Word* v. *Poelker*, 495 F.2d 1349, 1351-1352 (8th Cir. 1974); *Friendship Medical Center* v. *Chicago Bd. of Health*, — F.2d — (7th Cir., Oct. 30, 1974) (No. 74-1070); *Hodgson* v. *Anderson* 378 F. Supp. 1008, 1017 (D. Minn.) (three-judge court), *appeal docketed sub nom. Spannaus* v. *Hodgson*, 43 U.S. Law Week 3139 (U.S., Sept. 9, 1974) (No. 74-254); *Coe* v. *Gerstein*, 376 F. Supp. 695, 696 (S.D. Fla. 1973) (three-judge court).

With respect to early second trimester abortions, a State *may* but has no obligation to "adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish." *Doe*, 410 U.S. at 195.

However, the State of New York chose not to adopt any such standards. N.Y. PENAL CODE § 125.05.3. One effort to impose standards on abortion facilities was ruled out as unconstitutionally vague in *People* v. *Dobbs Ferry Medical Pavillion*, 33 N.Y. 2d 584, 347 N.Y.S. 2d 452, 301 N.E. 2d 435 (1973), prior to this trial. Physicians were accordingly free in 1971 to perform first or second trimester abortions in their hospitals, clinics, or offices, according to their best medical judgment.

The prosecution of Dr. Ketchum is an effort to invent standards where there were none before and to incorporate such standards *ex post facto* into a felony criminal statute. If the effort succeeds, any community hostile to abortion can define malpractice as restrictively as supporting testimony can be found, and prosecute any physician performing abortions for deviations from that standard. The net result will be to dilute *Roe* v. *Wade* and *Doe* v. *Bolton* to the point that patients seeking abortions and physicians willing to perform them are at the mercy of local community climate.

Grossly Unfair Trial

Third, the New York courts permitted repeated prosecutorial misconduct and trial irregularities far more serious than those recently discussed in *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), *Cool* v. *United States*, 409 U.S. 100 (1973), and *Webb* v. *Texas*, 409 U.S. 95 (1972).

The New York Court of Appeals agreed that there had been "grievous misconduct" (App. A at 1a) by the prosecution which that Court "strongly con-

demn[ed]." (*Id.*) However, the Court saw no "pattern throughout the trial," a conclusion to which Petitioner strenuously objects.

As more fully appears hereinafter, the trial was a model of calculated, systematic prosecutorial misconduct designed not to determine guilt or innocence but solely to *convict* a medical man for alleged conduct which neither he nor any other person could possibly have known might someday be a criminal offense.

The problem of prosecutorial and trial judge misconduct, moreover, is recurring, of national interest, and appropriate for careful, regular review by this Court. Commentary on the subject has been extensive.[8]

This particular case is a good example because it presents the cumulative impact of "grievous misconduct" throughout a trial.

I. THE COURT SHOULD REVIEW DR. KETCHUM'S FOURTEENTH AMENDMENT CLAIM THAT HE WAS DENIED DUE PROCESS BECAUSE THE CRIMINALLY NEGLIGENT HOMICIDE STATUTE, NEVER BEFORE APPLIED IN A MEDICAL CONTEXT, AND THE INDICTMENT, PROVIDED NO NOTICE OF THE CONDUCT CHARGED, NOR OF SPECIFIC PRE-EXISTING PROFESSIONAL STANDARDS, AND THERE WAS NO EVIDENCE ON TWO ESSENTIAL ELEMENTS OF THE OFFENSE.

Appeals involving claims of statutory vagueness come to this Court each Term. Many, as here, claim a Fourteenth Amendment violation in the manner a statute was applied.

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[8] *See, e.g.*, Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case, 54 COLUM. L. REV. 946 (1954); Note, Prosecutorial Misconduct—Recent Second Circuit Cases, 2 HOFSTRA L. REV. 385 (1974); Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 TEXAS L. REV. 629 (1972).

While First Amendment vagueness claims have most often been reviewed, "[v]ague laws in any area suffer a constitutional infirmity. . . ." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). The Court has not hesitated to rectify fundamental unfairness in the application of indefinite statutes or rules.

This case would be an excellent one for review because it involves the important issue of fair notice, the novel problem of criminal negligence, and the need to protect physicians from the imposition of unannounced community medical standards in the sensitive abortion context.

Lack of Notice in Statute

The criminally negligent homicide statute, attacked on its face, and as applied, is not a model of explicitness, even in the drunken driving context where it is almost always applied. Derived in part from the Model Penal Code, the statute has been widely criticized as not a defensible predicate for criminal liability. Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963).

Two principal ambiguities in the statute affect this case.

First, the definition for criminal law purposes of "the standard of care that a reasonable person would observe in the situation," N.Y. PENAL CODE § 15.05(4), in this context, provides no notice of any specific actions or inactions. Potentially, it allows, without warning, scrutiny of every step taken or every step which could have been taken by Dr. Ketchum on the day the patient expired.

Similarly, the definition of "gross deviation," N.Y. PENAL CODE § 15.05(4), is obscure.

In an area with evolving medical standards such as abortion, where community emotions cannot be excluded, a physician is at the mercy of a lay jury and any one or group of physicians hostile to him.

The decision of the New York Court of Appeals, upholding the statute as it had done before, is inconsistent with many Fourteenth Amendment due process cases from this Court.

For example, *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 404 (1966), struck down a statute allowing imposition of costs on an acquitted defendant who had been guilty of some undefined "misconduct," "reprehensible" conduct, or "improper" conduct. This was the type of law which

> "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." 382 U.S. at 403.

In this case the jury was free to adopt any physician's opinion as to what constituted a proper medical standard, and a gross deviation therefrom, even though Dr. Ketchum had no advance warning of what that opinion would be, since there were no legislative regulations and those which did exist had been struck down as unconstitutionally vague in *People* v. *Dobbs Ferry Medical Pavillion*, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973).

This Court has repeatedly held that:

> "[t] avoid the constitutional vice of vagueness, it is necessary, at a minimum that a statute give fair

notice that certain conduct is proscribed." *Rabe* v. *Washington*, 405 U.S. 313, 315 (1972).

Whereas in *Rabe* there was no fair notice that criminal liability depended upon the place a film was shown, here the statute had never even been applied in a medical setting and provided no notice of medical standards and how they were to be ascertained.

Review of this case and reversal are warranted on the above basis alone.

Lack of Notice in Indictment

While a specific indictment or prosecutor-drafted bill of particulars cannot cure an unconstitutional statute, it can worsen the fair notice problem. Here the indictment is open-ended, providing no notice of what is meant by "under all the circumstances of the case." This allowed the prosecutor to work out the standard of care and elements of the offense up to the eve of trial.

The definition of "vaginal hysterotomy" also developed to be a point of contention. Dr. Patterson, for the prosecution during his definition of "vaginal hysterotomy" acknowledged that: "I am describing the procedure, not what was in the pathology report." (R I: 1056). Dr. Ketchum, however, was prosecuted on the basis of the pathology report. If the procedure there described was not a vaginal hysterotomy, he was entitled to an acquittal!

Further, the indictment charged a failure to provide "proper medical care" after the operation. The specific recommended aftercare was not defined, nor did the indictment explain how the alleged failure of unspecified aftercare caused death. There never was a specification of errors or omissions of conduct.

In short, Dr. Ketchum went to trial without fair notice of the acts and/or omissions charged, nor of the specific standards by which he was to be judged.

The need to deter such fundamental deprivations of elementary due process warrants review by this Court.

Lack of Pre-Existing Legal Standards

The absence of prevailing legal standards is shown by numerous factors. The grand jury which indicted Dr. Ketchum itself concluded that there were no required legal standards pertaining to abortion in New York. The Conclusions from the September 15, 1972, Report of the Grand Jury are included in Appendix B, at 3a-4a, and are an admission against interest in view of the majority's explicit objection to "demand abortions," (App. B at 3a), or elective abortion as then legalized in New York.

The Grand Jury Report recommended the passage of "appropriate legislation which sets by law the proper medical guidelines, standards, and conditions under which abortions can be performed." (App. B at 16b). Such standards did not exist at that time under the law! The Grand Jury repeated that "no where in the law is the doctor *required* to perform his services in properly equipped clinics or hospitals, under strict sanitary conditions."

If that was the case, Dr. Ketchum should never have been indicted.

Dr. William E. Mosher, Commissioner of Health for Erie County, was called by the prosecution. He testified it was correct that "[e]ach physician was free to choose whatever procedure they decided was best at the

time in their office . . ." (R III:1120). Over objection (*Id.* at 1122) Dr. Mosher testified about the State Sanitary Code requirements, although the Code had been declared unconstitutionally vague as applied to abortion facilities. *People* v. *Dobbs Ferry Medical Pavillion, supra.*

Even though he was oblivious of the *Dobbs Ferry Case,* Dr. Mosher candidly acknowledged the absence of pre-existing legal standards for abortion practice in physicians' offices.

Again, the lack of standards requires an outright reversal. The Record is full of evidence, which this Court may and constitutionally should review which shows an absence of pre-existing, clearly defined legal standards for the medical practice of abortion.

Dobbs Ferry Case

The treatment by the New York Court of Appeals of abortion clinic regulations in *People* v. *Dobbs Ferry Medical Pavillion*, 33 N.Y.2d 584, 347 N.Y.S.2d 452, 301 N.E.2d 435 (1973), also shows the absence of reasonably ascertainable pre-existing medicolegal standards. *Dobbs Ferry* was not even mentioned in the opinions below although it showed as a matter of law an utter absence of clearly defined professional standards for the performance of abortions in facilities within New York.

The *Dobbs Ferry* case originated as a civil action by the Attorney General to enjoin the operation of an abortion clinic for purported violation of the New York Public Health Law. The People sought to define a physician group practice as a "hospital," requiring approval of the State Public Health Council

under N.Y. Public Health Law § 2801 and 10C N.Y. C.R.R. § 700.2[a](6), the State Hospital Code.

The New York Court of Appeals affirmed on July 3, 1973, an order of the Appellate Division, 40 App. Div. 2d 324, 340 N.Y.S.2d 108 (2d Dep't 1973), invalidating as unconstitutionally vague and overbroad the very definitions of "hospital," "facility," and "clinic," as applied to a group of physicians performing abortions in a group practice.

If the only statutes in New York regulating abortion facilities were unconstitutionally vague, how then could a physician such as Dr. Ketchum be held criminally responsible for the violation of those standards when combined with similarly vague notions as to what was and what was not acceptable medical practice?

Roe and Doe Show Shifting Medical Standards

The opinion of the Court in *Roe* v. *Wade*, 410 U.S. 113, 141-148 (1973), shows the extent to which medical standards in the abortion field have shifted rapidly in the short space of a few years.

Discussing the position of the American Medical Association, 410 U.S. at 141-144, the Court notes a transition from "general suppression" of abortion in the 19th century to a more permissive posture in 1967, allowing abortion for "health" reasons if "performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." 410 U.S. at 143. (The latter restriction, of course, was held unconstitutional in *Doe* v. *Bolton*, 410 U.S. 179, 193-195 (1973)).

Within the AMA, in 1970, *Roe* recalled, there were noted by its study committees a "polarization of the medical profession on this controversial issue; division among those who had testified; a difference of opinion

among AMA councils and committees; 'the remarkable shift in testimony' in six months . . . and a feeling 'that this trend will continue.' " 410 U.S. at 143.

The AMA picture, then, is one of shifting standards. A similar pattern was found within the American Public Health Association and the American Bar Association. *Roe* v. *Wade, supra* 410 U.S. at 144-47. While the mandatory hospitalization requirement of the 1962 MODEL PENAL CODE § 230.3(2), was accepted by many States and the American Law Institute, experience proved the restriction unnecessary and, ultimately, unconstitutional. *Doe* v. *Bolton, supra,* 410 U.S. at 193-195. The Commissioners on Uniform State Laws, by 1972, also decided not to mandate hospitalization for abortion patients. *Roe* v. *Wade, supra,* 410 U.S. at 146-47 & nn. 40-41.

The numerous briefs of *amici* before this Court in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), further illuminate the often philosophically-based differences of opinion on acceptable medical standards in the abortion field.

While the Brief for *Amici Curiae American College of Obstetricians and Gynecologists et al.*, pp. 80-90, cited in *Doe* v. *Bolton,* 410 U.S. 179, 193 n.13 (1973), argued that abortion was a relatively safe medical procedure which should not be restricted to hospitals alone, sharply contrasting briefs were filed by other groups and physicians.

The *Motion and Brief Amicus Curiae of Certain Physicians, Professors, and Fellows of the American College of Obstetrics and Gynecology* [*sic*][9] *In support*

[9] The organization is correctly styled ACOG, the American College of Obstetricians and Gynecologists.

of Appellees, filed jointly in *Roe* v. *Wade* and *Doe* v. *Bolton* devoted 26 pages to a section, *id*, pp. 32-58, entitled "Medical Hazards of Legally Inducted Abortion." This Brief strongly opposed the position ultimately taken by the Court and went so far as to state: "The claim that abortion is X-times as safe as childbirth is a fabrication invented to sell abortion." *Id.* at p.45.

It is beyond the scope of this Petition to demonstrate why the Court correctly invalidated laws mandating hospitalization for all abortion patients. The pertinent point for this case is that notions of acceptable medical practice for the performance of abortions do vary widely and have changed greatly in recent years. A physician such as Dr. Ketchum should not be left to the mercy of local physicians' standards when a jury could adopt testimony directly at odds with the national constitutional standards enunciated in *Roe* v. *Wade* and *Doe* v. *Bolton*.

No Evidence on Essential Elements of Offense

A further basis for review is that the People produced no competent evidence whatever on two essential elements of the offense.

This Court has repeatedly held that " 'a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process.' " *Vachon* v. *New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam). See also *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In *Vachon*, *supra*, a conviction was overturned for the absence of any evidence that the appellant had

personally sold or caused to be sold to a minor a certain button.

Here there was utterly no competent evidence on two essential elements of the offense of criminally negligent homicide, N.Y. PENAL CODE §§15.05, 125.10, as further explicated by the indictment.

No Evidence of "Vaginal Hysterotomy"

The indictment charged that Dr. Ketchum had chosen to do an operation called a "vaginal hysterotomy." There was no proof of that charge. The prosecution named the wrong operation as much as if they had charged an abortion done by removing the appendix.

A "vaginal hysterotomy," by definition, requires, *inter alia*, an incision into the uterus, from which the fetus is removed. (R III:1478). Dr. Vuitch, who had been trained in vaginal surgery at Vienna and had performed several dozen such procedures (*Id.* at 1575), explained the procedure, its elements, and that the pathology report simply showed no evidence of a vaginal hysterotomy. (*Id.* at 1478). He explained correctly that his description coincided with that in all the medical texts. (*Id.* at 1482).

The indictment error was that a vaginal hysterotomy does not include an incision in the cervix, but rather in the uterus, which is a different organ. In short, the prosecution was trying Dr. Ketchum for something he never did. *Cf. Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

Dr. Patterson, testifying for the People, admitted in his definition of vaginal hysterotomy that: "I am describing the procedure, not what was in the pathology

report." (R II:1056). In other words, he was describing what Dr. Ketchum was indicted for, not what he did! Neither Dr. Patterson (*Id.* at 1005) nor Dr. Gopelrud (R I:829) had ever performed a vaginal hysterotomy in any event.

The defense suggested that the tear in the uterus resulted from the use of packing forceps while inserting a gauze pack to stop bleeding. That is why the tear was concentrated down in the cervix rather than up in the uterus.

In sum, there was no evidence, as a matter of law, that a vaginal hysterotomy was performed. A conviction based upon no evidence on an element of the offense violates due process. *Vachon* v. *New Hampshire, supra.*[10]

No Evidence of "Gross Deviation"

The prosecution did not establish pre-existing legal standards by which Dr. Ketchum could guide his medical practice, as discussed above. It follows that no "gross deviation" from such standards could be established, as required by N.Y. PENAL CODE § 15.05(4).

No effort, indeed, was even made to quantify the extent of departure from those standards the prosecution attempted to develop during the course of the trial.

All that emerged from the testimony was that certain medical experts, who had never done a vaginal hysterotomy, thought it was dangerous and more complicated than necessary. They thought all second tri-

[10] If one were to assume the contrary, then the Fourteenth Amendment would surely require that Dr. Ketchum be notified in some way that vaginal hysterotomies were illegal in New York.

mester abortions should be done in a hospital, a ·gh this was not the law.

There was no testimony to the *extent* of danger when contrasted, for example, with childbirth as in *Roe* v. *Wade*, 410 U.S. 113, 149 & n. 44 (1973).

In sum, there was no evidence from which to conclude that a "gross deviation" from acceptable medical standards had occurred.

II. THE COURT SHOULD REVIEW DR. KETCHUM'S FOURTEENTH AMENDMENT CLAIM THAT HE WAS DENIED A FAIR TRIAL BECAUSE THE PROSECUTION FOR CRIMINAL NEGLIGENCE IN PERFORMING A LEGAL ABORTION RESULTING IN DEATH WAS PERMEATED WITH IMPROPRIETIES AND ERROR WHICH EVEN THE COURT OF APPEALS RECOGNIZED AS INCLUDING "GRIEVOUS MISCONDUCT" TO BE "STRONGLY CONDEMN[ED]."

In each recent Term this Court has reviewed several cases involving claims that a defendant was denied a fair trial. Such cases involve claimed violations of specific provisions within the Bill of Rights, *e.g., Griffin* v. *California*, 380 U.S. 609 (1965), trials which are alleged to have been generally unfair, *e.g., Chambers* v. *Mississippi*, 410 U.S. 284 (1973), or, as here, a combined claim that specific fundamental rights were abridged and that the trial as a whole was fundamentally unfair.

Misconduct Much More Serious Than in Donnelly v. DeChristoforo

In the New York courts the People relied heavily on *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), as sanctioning even more serious prosecutorial misconduct than that involved here. *Donnelly*, however, is not an invitation to the type of "grievous misconduct" which the New York Court of Appeals found

below. Indeed, this is precisely the variety of case to which the Court vowed not to extend the *Donnelly* rationale.

The Court in *Donnelly* dealt solely with "two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury." 416 U.S. at 640. One, "the expression of a personal opinion as to guilt," 416 U.S. at 640, was found improper, but not a denial of due process.

A second, "more serious" remark was a suggestion that the defendant and his counsel " 'hope[d] that you [the jury would] find him [defendant] guilty of something a little less than first-degree murder.' " 416 U.S. at 640. One interpretation of this remark was that the defendant may have sought to plead guilty to a lesser offense, and thereby admitted some guilt.

This Court found the "more serious" remark improper but not a denial of due process because (1) "[c]onflicting inferences," 416 U.S. at 643, could have been and in fact were drawn from the remark, and (2) the remark "was but one moment in an extended trial and was followed by specific disapproving instructions." 416 U.S. at 634.

By contrast, the present case involves numerous unambiguous instances of prosecutorial misconduct and trial error which permeated the entirety of the pretrial and of the trial.

C. Cross-Examination of Principal Expert Defense Witness Concerning Alleged Criminal Abortion Convictions Which Did Not Occur and Would in Any Event Have Been Constitutionally Irrelevant After Doe v. Wade and Doe v. Bolton.

As the Court stated, reversing a conviction in *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973):

> "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."

In this case Dr. Ketchum's right to call witnesses was seriously abridged by the treatment of his chief medical expert witness, Dr. Milan Vuitch of Washington, D.C., who had been involved in *United States* v. *Vuitch*, 402 U.S. 62 (1971).

This was undoubtedly one of the "examples of grievous misconduct by the prosecution in cross examination" (App. A at 1a) referred to by the Court of Appeals.

Dr. Vuitch was called as the primary defense medical expert concerning the central questions in the case. The direct testimony of Dr. Vuitch had been highly favorable to Dr. Ketchum and, if accepted, would unquestionably have required a verdict of not guilty. (R III:1473-1509).

To prevent this, the prosecutor set out to destroy Dr. Vuitch in the eyes of the jury in a manner highly offensive to fair trial due process concepts embodied in the Fourteenth Amendment.

This "grievous misconduct" interferred with Dr. Ketchum's "right to offer testimony," *In re Oliver*, 333 U.S. 257 (1948), and right "to call witnesses in [his] own behalf," *Chambers* v. *Mississippi*, 410 U.S.

284, 294 (1973), in a manner far more serious than that in the *Chambers* case.

On direct examination it was shown that Dr. Vuitch had impressive qualifications and experience, both in Europe and in the United States (R III:1473-1477). He was board-certified, had 34 years of surgical experience, and particularly had been trained in vaginal surgery.

Dr. Vuitch carefully explained precisely why the medical reports conclusively showed no evidence of a vaginal hysterotomy. (R III:1478-1482). He explained how, when, why and where the tear probably took place. (R III:1491-1496). He went over his own experience with amniotic fluid embolisms. He concluded from the medical photographs that the deceased patient had probably been from 12 to 14 weeks pregnant (R III:1502), a borderline first trimester case.

On cross-examination the prosecutor wasted no time in committing reversible error.

First, Mr. Cleary stated:

> Q. *As has Dr. Ketchum,* you have had *troubles with the law* because of abortions, haven't you? (R III:1514) (Emphasis added).

Then Mr. Cleary asked:

> Q. Have you been convicted, Doctor, for illegal abortions?" (R III:1514).

Before time for an objection, Dr. Vuitch acknowledged that he had been indicted. (*Id.*).

Defense counsel objected repeatedly and moved for a mistrial. (*Id.*). The trial court denied the motion without explanation, and briefly told the jury to disre-

gard the line of questioning. The entirety of that testimony appears in Appendix B hereto, at 4a-6a.

The foregoing is equalled, but not excelled in the prosecutorial misconduct throughout the trial. It is reversible error in more than one respect.

The prosecutor knew or should have know the reported litigation history of Dr. Vuitch, and that in fact all of the charges were disposed of, leaving no convictions.

United States v. *Vuitch*, 305 F.Supp. 1035 (D.D.C. 1969), *modified*, 402 U.S. 62 (1971), *indictment dismissed*, Crim. No. 1460-70 (D.D.C. Nov. 4, 1971), was a major case in this Court as was *Vuitch* v. *Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973). At least the prosecutor should have been aware of those cases, which had been fully reported long before questioning.

It is unthinkable to allow a prosecutor to ignore published decisions from this Court, while requiring the Petitioner to defend himself on a charge of violating totally unpublished, indefinite, medical standards.

The fact of indictment or, indeed, conviction on illegal abortion charges was utterly irrelevant and highly prejudicial. Even a conviction would be inadmissible since *Roe* v. *Wade*, 410 U.S. 113 (1973), is the classic type of case to be applied retroactively. This has been done in the Second and Fourth Circuits. *United States ex rel Williams* v. *Preiser*, — F.2d — (2d Cir.), *cert. denied*, 43 U.S. Law Week 3331 (U.S. Dec. 9, 1974) (No. 74-78); *Vuitch* v. *Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973).

Here the prosecutor portrayed the chief defense medical expert as a multiple criminal offender when, in fact, any conduct had been constitutionally privileged

This was seriously aggravated by the insulting manner in which the prosecutor referred to the witness: Below are some examples:

> "I am thankful you are in the District of Columbia." (R III:1531)
>
> "We all didn't come from Vienna, Doctor." (*Id.* at 1526).
>
> "But he is wrong and you are right from way down in Washington, D. C." (*Id.* at 1624).
>
> "We all have the distinctive impression of how well you like yourself." (*Id.* at 1630).

The prosecutor suggested further that Dr. Vuitch openly ignored the law before *Roe* v. *Wade* (R III: 1519), and performed abortions for any reason. (*Id.* at 1518).

During summation, the prosecutor characterized Dr. Vuitch as "[t]he Viennese sausage maker . . ." (R IV:2334) and "an arrogant self proclaimed king of the abortionists . . . coming here for nothing but to protect somebody else who may be looking for his record." (*Id.*)

This language, tasteless in any forum, is an outrageous violation of civilized courtroom standards. It is a gross appeal to regional and ethnic bigotry. In isolation or taken with other trial misconduct, it shows reversible error.

Verbal Abuse of Dr. Ketchum

The abuse of Dr. Vuitch was only exceeded by that which the prosecutor reserved for the defendant, Dr. Ketchum.

In summation the prosecutor represented that "in the case of Dr. Ketchum the abortions were not removed from the back alleys, from the hotel rooms . . . ." (R IV:2269-70).

Repeatedly Dr. Ketchum was accused of practicing medicine solely for financial gain:

> ". . . [H]e has got to clear that table to put somebody else on it and to get another five hundred bucks." (*Id.* at 2293).
>
> ". . . [T]hat is why Ketchum performs this kind of procedure, it is simply money. You don't have to do many of them at $500 a copy each day to understand the kind of money that you and I don't even dream about." (*Id.* at 2295).

Similarly, the prosecutor made insistent appeals to local and regional prejudice:

> ". . . [H]e moves here like some carpetbagging charlatan with his little black bag . . . ." (*Id.* at 2294).
>
> ". . . the out of state carpetbagging physician who came in here." (*Id.* at 2301).
>
> "The carpetbagger himself . . . ." (*Id.* at 2318).

Those outrageous remarks, reminiscent of appeals to racial prejudice in another era, could not have been harmless. If a prosecutor can get by with the remarks made above, there are no limits to the extent of "grievous misconduct" the New York Court of Appeals will sanction.

CONCLUSIONS

Petitioner has a Federal constitutional right not to be prosecuted unless his conduct was proscribed by pre-existing standards of law as to which he had fair notice, and unless evidence of each element of the offense was shown.

Petitioner further has a constitutional right under the Fourteenth Amendment to a fair trial before an impartial judge and jury.

These important rights were denied in the courts below.

This Petition presents two substantial Federal questions of importance to the maintenance of civilized Fourteenth Amendment standards. The Court should grant review.

Respectfully submitted:

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APPENDIX

APPENDIX A

**Memorandum of the New York Court of Appeals,
People v. Jesse Ketchum, No. 419,
October 23, 1974**

STATE OF NEW YORK
COURT OF APPEALS

No. 419

THE PEOPLE &c., *Respondent,*

v.

JESSE KETCHUM, *Appellant.*

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

The order appealed from should be affirmed.

The record discloses examples of grievous misconduct by the prosecution in cross examination and summation which we strongly condemn. However, since the overwhelming proof is all but conclusive of defendant's guilt, and the misconduct does not reflect a pattern throughout the trial, but rather reactions at certain times of stress, reversal is not warranted.

* * * * *

Order affirmed in a memorandum. Concur: Breitel, Ch. J., Gabrielli, Jones, Wachtler, Rabin and Stevens, JJ.

Memorandum of the Supreme Court of New York, Appellate Division, Fourth Department, People v. Jesse Ketchum, — App. Div. 2d —, 358 N.Y.S.2d 353 (4th Dep't, June 27, 1974)

PEOPLE of the State of New York, *Respondent,*

v.

Jesse KETCHUM, *Appellant.*

Supreme Court, Appellate Division, Fourth Department. June 27, 1974. Raichle, Banning, Weiss & Halpern, Frank G. Raichle, Buffalo, for appellant. Edward C. Cosgrove, Dist. Attorney, Judith Blake Manzella, Buffalo, for respondent. Judgment unanimously affirmed. (Appeal from Judgment of Erie Supreme Court, Marshall, J., convicting defendant of Criminally Negligent Homicide.) Present: MARSH, P. J., and WITMER, SIMONS, GOLDMAN and DEL VECCHIO, JJ.

Judgment of Conviction Appealed From

THE PEOPLE,

v.

JESSE KETCHUM.

OCT 26 1973 Frederick Marshall, J. S. C. Dan Pearson, Stenog. E. Carey Cantwell, Asst. D. A. Roy Carlisi, Counsel for deft. moves to set aside the verdict as being inconsistent with the verdict and against the weight of the evidence. Motion denied.

The Court sets bail at $10,000.00.

ORDERED AND ADJUDGED, that the defendant be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 3 years and the defendant be committed to the custody of the State Department of Correction and he shall be delivered to the Attica Correctional

Facility at Attica, New York, there to be dealt with in accordance with the laws pertaining to his sentence.

Oct 26 1973 Order staying judgment pending appeal.

APPENDIX B—EXCERPTS FROM RECORD

Conclusions From September 15, 1972 Report of the December, 1971 Grand Jury of the County of Erie Proposing Recommendations for Legislative Action in the Public Interest Pursuant to Section 125.05-3 of the Criminal Procedure Laws and Regulations for the State of New York

The entire body of the Grand Jury with all 17 voting members in total and harmonious agreement most strongly recommend that the Legislature of the State of New York take immediate steps to pass appropriate legislation which sets by law the proper medical guidelines, standards and conditions under which abortions can be performed.

This position is not meant in any way to compromise the majority's position against demand abortions but only to protect women who are being aborted while the present law is in effect.

The discovery that the only condition placed upon a justifiable abortional act is that it be performed on a consenting female by a duly licensed physician outraged the sensibilities of this body. For we have discovered that no where in the law is the doctor *required* to perform his services in properly equipped clinics or hospitals under strict sanitary conditions.

Indeed this Statute as it now stands unassisted and unimplemented by legally legislated medical standards and guidelines, did not in fact remove abortions from dingy, unequipped and unsanitary hotel rooms but simply made those places legally acceptable operating rooms.

Any duly licensed physician who so chooses can now turn any office, hotel room or even a garage into an operation amphitheater running patients through an assembly line fashion with little or no preparation and absolutely no after care, because the law does not require him to follow generally acceptable medical standards.

Serious abortional surgery can be performed in a room or office which has no equipment at all other than a scalpel, a curette, sutures and a needle. No blood, no trained personnel, no proper after care facilities, little or nothing are presently required by law.

We therefore strongly urge the Legislature of this State to rectify that frightening oversight and legislate into law proper medical standards and guidelines along the lines of those recommended by the New York Medical Association to all of its members. These guidelines must be backed up not simply by the request or suggestion of the Medical Association of New York but by the mandates of proper statute under this State Public Health Law. Attached hereto and made a part of the recommendation of this Grand Jury is a copy of those guidelines.

The Grand Jury respectfully requests that an Order be made and entered accepting and filing this report as a public record; further that the District Attorney be authorized and directed to transmit copies of this report to members of the New York State Legislature, the members of the Court of Appeals of the State of New York, and any other official having a proper interest in this report.

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Milan Vuitch for Defendant, Cross. [1514]

A. General and gyn surgery, that is my specialty.

Q. As has Dr. Ketchum, you have had troubles with the law because of abortions, haven't you?

MR. CARLISI: I object to the question and ask to have it stricken and the court instruct the jurors not to consider that as evidence.

THE COURT: The jury will disregard it.

MR. CARLISI: I move for a mistrial at this time.

THE COURT: Motion denied.

MR. CARLISI: Exception.

THE COURT: You are not to consider that in any way, members of the jury.

BY MR. CLEARY:

Q. Have you been convicted, Doctor, for illegal abortions? A. I was indicted 16 times.

Q. For performing illegal abortions, right? A. I was instrumental in legalization of the abortion surgery in the United States, as you know very well, Mr. Attorney.

Q. I understand that, Doctor. You have been convicted, have you not, for illegal abortions? A. That conviction was ei ased by the Federal Court.

Q. You are still not answering my question, Doctor. [1515]

MR. CARLISI: I object.

MR. CLEARY: I would appreciate it if you would.

MR. CARLISI: I am going to continually object to this whole line of questioning.

THE WITNESS: Yes, I was convicted in the lower courts.

MR. CARLISI: This is irrelevant, immaterial and highly prejudicial to the defense. If you continue allowing this type of questioning I ask the court to allow the doctor to explain the fact that the Supreme Court of the United States vindicated him and overruled and overturned every one of those decisions.

The Court: Wait a minute, counsel. You are saying two things. We are talking about two things. We are talking about convictions first of all and convictions are proper to impeach the credibility of the witness.

MR. CARLISI: I'm not so sure, your Honor. If I may be heard for a moment, I'm not sure the doctor understands that an overturned reversed case on the part of a higher court indicates—

THE COURT: Are you saying that his convictions were [1516] reversed?

MR. CARLISI: Yes, sir.
THE COURT: By a higher court?
MR. CARLISI: Yes, sir.
THE COURT: His convictions were erased?
MR. CARLISI: He has no convictions.
THE COURT: Why doesn't he say that?
THE WITNESS: I am not legally trained, your Honor.
MR. CARLISI: He is a physician.
THE COURT: He knows whether or not there was a reversal of a conviction. Were you ever convicted and was that conviction reversed? Is that what you are telling us.
THE WITNESS: Yes.
THE COURT: Then you have never been convicted.
THE WITNES: That's correct.

BY MR. CLEARY:

Q. Now then, Doctor, at this time you are professionally performing abortions, is that correct? A. That's right. 80 percent of my practice or 75 percent of my practice are therapeutic abortions.

Q. You keep using the term therapeutic abortion. A. That's correct.